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'TRUTH AND RECONCILIATION' AS RISKS

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ABSTRACT

This article aims to situate the fascinating and deeply controversial work of the Truth and Reconciliation Commission in South Africa within a theoretical context that may explain how its attempt to overcome the tensions between truth seeking and amnesty giving stumbled on its use of law to bring about reconciliation. It locates the root of the problem in the dual nature of the TRC as public confessional and legal tribunal, and underlying it the incongruent logic of law on the one hand and reconciliation on the other, the former requiring the reductions of risks, the latter requiring risk to be embraced.

ACCOUNTING FOR TORTURE

'"YOU DO NOT INTEREST me." No man can say these words to another without committing a cruelty and offending against justice.' This is how the modern mystic and Christian anarchist, Simone Weil, begins her treatise *On Human Personality* (Weil, 1989: 273).

Jeffrey Benzien was one of those who came before the Truth and Reconciliation Commission (TRC) to exchange truth for amnesty. He came to say how as a security policeman in the 1980s he had developed a torture technique known as the 'wet bag'. It involved placing a wet cloth bag over the head of the handcuffed suspect and twisting it tightly shut around his neck. Before the suspect suffocated, Benzien explained, the body would go slack. This is when he knew it was time to release the bag and get on with the interrogation. Benzien was instructed to demonstrate the technique and he did that; he stepped from his seat, crouched over a volunteer and applied the wet bag.

A member of the audience, Tony Yengeni, ANC activist and member of parliament, at the time a victim of torture in the hands of Benzien, does not

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take the opportunity to get back at Benzien. Instead he tries to understand. He asks: 'What kind of man uses a method like this one on other human beings, repeatedly listening to those moans and cries and groans, and taking each of those people near to their deaths? What kind of man are you, what kind of man is that, what kind of human being can do that, Mr Benzien?' Benzien replies: 'I ask myself that same question every day, sir'. He concludes: 'With hindsight, sir, I realise that it was wrong and for that I apologise . . . I can only say that I am extremely amazed and very happy to still be in South Africa today – and I am still a patriot of the country.'

When I first came across this I thought it a remarkable exchange. How great the redeeming power of the word! But there is more to be said about this incident, about the accounting of it. In fact, Tony Yengeni had to pay dearly for this moment, the demonstration of the cruelty that had been inflicted upon him, his redemption. Benzien resumes his seat and in the true spirit of 'full disclosure' levels him the blow: 'Do you remember Mr Yengeni that it took you thirty minutes before you betrayed Jennifer Schreiner? Do you remember pointing out Bongani Jonas to us on the highway?' 'And,' adds Antje Krog in her excellent book *Country of My Skull*, 'Yengeni sits there – as if begging this man to say it all; as if betrayal or cowardice only make sense to him in the presence of this man' (Krog, 1998: 73). And from the *Cape Times*: 'And so continues the torture of Tony Yengeni. Yengeni broke in under thirty minutes, suffocating in a plastic bag that denied him air and burnt his lungs, under the hands of Benzien. In the mind of Benzien, Yengeni, freedom fighter and anti-apartheid operative is a weakling, a man that breaks easily' (Krog, 1998: 73).

But I would rather not make too much of this last point. I would like to keep the fact that Yengeni wants to know why; that Benzien will attempt an accounting. In this, something *is* restored. In the words of Cynthia Ngewu, mother of Christopher Piet who was murdered by the security forces, one of the 22,000 to come before the commission: 'This thing called reconciliation . . . if I am understanding it correctly . . . if it means this perpetrator, this man who has killed Christopher Piet, if it means *he* becomes human again, this man, so that I, so that all of us, get our humanity back . . . then I agree, then I support it all' (quoted in Krog, 1998).

Torture is pure negation. Torture is the undoing of communication,[1] it is 'reversion to the pre-language of cries and groans', as Elaine Scarry put it; 'it brings about', she says, 'an absolute split between one's sense of one's own reality and the reality of other persons' (Scarry, 1985: 52). As such, it does not merely violate the ethical, it annihilates it. In all cases torture and the infliction of pain aims at the annihilation of the Other; this is true of all rationales under which torture is undertaken: the extraction of information, the defeating of the tortured or their elimination. In South Africa, in October 1998, former foreign minister Pik Botha conceded that words such as 'eliminate' and 'remove from society' were commonly used in the State Security Council, apartheid's power centre. But in the other cases too, even where speech is used, interrogation annihilates the addressee by displacing him onto

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an instance where his speaking position is withdrawn. Rolando Gaete talks of how torture victims often tell you about the lack of relevance of the questions they were asked: 'In some cases the torturer cannot understand the answers and yet this is of no concern . . . [During torture] the torturer asks those meaningless questions with no interest in the answer. In instances of political torture, the torturer is interested in names but not in a confession – since the confession won't be used in a trial – and yet he insists on a confession because confession is a mode of defeat or self-betrayal' (Gaete, 1996: 309).

Communication invokes ethics back. There is, however, some ambivalence here about the mode of this invocation. I want to point to this because in a crucial way it underpins my own ambivalence toward the Benzien/Yengeni exchange. To explain it let me stagger the argument about the rationality of communication – the invocation of rationality.

As Benzien is confronted by his victim and asked for a justification he has to make an effort to address the question; in addressing it as reasonable he is situating his addressor, now addressee, as rational other. Yengeni, his interlocutor, becomes someone to whom an explanation is owed. An explanation invokes rationality and thus positions the interlocutor as someone worthy of deeming it acceptable, convincing and truthful. Without wanting to make too much of this, let alone invoke a fully fledged account of communicative rationality here,[2] it is arguable that a plain of rationality is at least aspired to, where communicative offers seek acceptance and in that alone restore the dignity of those seeking a mutual understanding, a passage through – what has since become a key concept for truth commissions – the *catharsis* of communication.

What makes the exchange between torturer and tortured remarkable is that for the first time what is undergone, ever so tentatively, is the experience of community *as* communication.[3] I cannot stress enough how weak a content I give the word 'community' here, but what I mean is this: what else is speech more fundamentally than an exposure? The essence of speech lies in its being exposed and 'offered'. It is an act of offering that beckons an addressee. As far as I understand what Aristotle means by *logos*, its value lies in its being shared. In establishes the possibility of sharing a world and its value, its *telos* even, is in its exposure to the other, as offer to be taken up, as inclination across the void of subjects. *Logos*, in other words, is a genuine act of sharing, and an offer of communication is an offer of being-in-common. In the context of the hearings, *for the first time* the tortured is positioned as addressee; *for the first time* the torturer *inclines* outside himself towards that space that the communicative offer establishes for being-in-common. For the first time a justification is sought from the tortured. For the first time an explanation is risked from the torturer. On this first reading of it, speech restores humanity in the strong sense of it inclining addressor towards addressee and establishing the ethical space where the being-in-common might be projected. The space of ethics emerges, its possibility no longer negated.

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But there is a second reading that withdraws this space again. Quite evidently in the case at hand, the withdrawal is in the moment when Benzien's action reverts from communicative to strategic, when it becomes a means of discrediting. Of course, already in the hearings the communicative field has shifted and with it has shifted what counts as legitimation; the torturer can no longer hide behind the now discredited authorising norm and avoid responsibility. It is this withdrawal of the legal legitimation, of the possibility of strictly 'agentic' behaviour, that allows my staggering of the question in the first place: the hearings *do* invoke communication that must, in turn, rely on reasons, not evasions. But that does not *eo ipso* install transparency, dignity, responsibility; it does not *eo ipso* replace violence with the word.[4] There is still in this communication the violence of exclusions, either in the form of the reductions of institutional meanings, or the violence of *différends* that play on the complex combinations of exclusions that thus become impossible to redress.[5] The problem then becomes this: one needs to find a space to speak and for the ethical inclining across the void of 'intersubjectivity' to be true, it needs to determine its own space. Where this is denied by the mode in which speech is invited, ethics demands that the space is reclaimed. And where available spaces are foreclosed by the law, where the meta-politics of rational discourse and consensus are too confining, unyielding, ideological, where *différends* are litigated away, politics meets ethics in the urgency to establish the conditions of speech, against the legal definition of reality that forecloses ethics.

There is, of course, very little room for these politics in the context of the hearings. I mention it only to qualify my earlier statement about the redeeming qualities of communication. And yet I would like to retain and salvage something in all this: a redemption that I find impossible to deny. It lies in Yengeni's insistence on his question: 'how could you do that?', a repetition that eventually breaks down resilience during that face-to-face interaction, that eventually exposes Benzien, that makes it increasingly difficult, eventually impossible for him to hide. The torturer eventually finds himself before a responsibility he cannot escape. And I find this communication exceptional in the way Levinas finds all 'communication exceptional [in that] you are always in the face of the Other [Autrui], *where there is no privacy*' (Levinas, 1996: 29).

In either case, and however redeeming we find the exchange between torturer and tortured, with Benzien and his account we have come a long way from the torturer's 'you do not interest me'. It is a feat of the processes established in the context of truth commissions, often under extreme circumstances, by people of remarkable courage, that a space for humanity is restored through the dignifying recourse of accounting for pain suffered.

And yet the TRC remains disarmingly perplexing. The South African poet Kgositsile writes this in *When the Clouds Clear*: 'As the ancients say/When the clouds clear/We shall know the colour of the sky' (in Woods, 1998: 127). But as the hearings railed on with an intent that we, outsiders, can hardly grasp, this was a storm with no subsequent clearing. Of course there was

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accounting for pain, there was truth, there was remorse sometimes, forgiveness sometimes. All of it deeply humbling. But there was no resolution and to that extent at least there was no catharsis. I will offer one possible explanation of the failure: I will argue that the TRC failed in so far as it tried *to reconcile within itself its dual nature as legal tribunal and public confessional.* That is what makes it schizophrenic, that is its faultline and on that it stumbles. At every step, what the law brings to the process undercuts the infinitely delicate – and risky – process of reconciliation. I will say something more on this self-undermining 'hybridity', on the TRC's straddling of the institutional and the discursive moments, in the next section. After that I will undertake a systematic analysis of why this dual nature is stifling. I will argue that law in every dimension always-already defines away the risk that is at the heart of reconciliation. I will explain this in the three dimensions of meaning as set out by Luhmann (1995).[6] I will explore why, in each of these dimensions, reconciliation requires – indeed pivots on – *risk*. I will explore the mutually opposing, mutually undercutting ways in which the meaning of law and the meaning of reconciliation operate. My argument is that law subverts the reflexivity that reconciliation requires and defines out the risk that, alone, would have brought it about.

THE HYBRID TRUTH COMMISSION

The Interim Constitution of 1993 that instituted the TRC did it on the basis that 'there is a need for understanding but not for vengeance, a need for reparation but not retaliation'. In this the need to provide a forum for storytelling ties in with a second 'function': that of 'facilitating the granting of amnesty to persons who make full disclosure of all the relevant facts'. Truth gathering, the determination of historical fact, links internally with reconciliation, understood as, or at least in the context of, the granting of indemnities to those who confess. The politics of amnesty link directly to the politics of memory: no amnesty without knowledge, thus without acknowledgement, thus without confession. The South African Minister of Justice, Mr Dullah Omar, puts it this way in his introduction to the Act: 'I could have gone to Parliament and produced an amnesty law – but this would have been to ignore the victims of violence entirely. We recognised that we could not forgive perpetrators unless we attempt also to restore the honour and dignity of the victims and give effect to reparation'. *The link between confessional and tribunal is thereby drawn.*

So the TRC was seen crucially as a forum where the victims and perpetrators of apartheid would tell their stories. As 'truth commission' it suspends its legal function, it aspires to recover the word; in this it shares the features of other truth commissions more than 15 of them in the last 20 years, most of them without constitutional backing, without law to carry their mandate. In Guatemala, for example, Edgar Gutierrez, Director of the 'Project for the Recovery of Historical Memory' (REHMI), Guatemala's

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Truth Commission, puts it like this: 'People are working with great difficulty to overcome the problem of impunity, but we have chosen another way forward: memory as an instrument for the rebuilding of communities, as the affirmation of the dignity of the victims, as the first act of justice: the recovery of the right of the word'.[7] As in every case where a commission like this is set up, truth is aimed at reconciliation: 'All this is oriented to the *nunca mas* (never again)'. But then, the REHMI is not the TRC; it is not vested with any legal power. It is not the victors' instrument for reconciliation. In fact it is working under extreme conditions, its leading figure bishop Gerardi the victim of brutal murder only days after he produced the report 'Guatemala never more' painstakingly laying out the details of 55,000 cases of violence (more than half of them murders), four-fifths of them blamed on the army, in a country where 100,000 have died, 140,000 disappeared during Guatemala's 36-year civil war.

But there is an even more extreme case of a non-legal forum that I will mention to press my point. In 1967, first in Stockholm, then in Copenhagen, an 'International War Crimes Tribunal' was set up, under the Honorary Presidency of Bertrand Russell, and the Executive Presidency of Jean-Paul Sartre (see Duffet, 1970). There were no individual defendants; the tribunal was to adjudicate on the questions whether the government of the US had committed acts of aggression against Vietnam, about the conduct of the war, about the complicity of other governments. There was no doubt that the tribunal was understood to be a 'tribunal *manqué*' by the organisers themselves. They disclaimed any intent to bring to justice or punish the perpetrators of the acts they condemned. Unlike the TRC, this was no victor's justice; nor was it victor's mercy.[8] As in the case of Guatemala, as in the case of all except a very few such commissions in the last 25 years, this court had no jurisdiction.

It did (nonetheless) incur the wrath of DeGaulle who wrote to Sartre that it was unthinkable that 'a state . . . a traditional friend . . . become the subject of proceedings . . . as appears to be the case with regard to the activity envisaged by Lord Russell and his friends, since they intend to give juridical form to their investigations and the semblance of a verdict to their conclusions. I have no need to tell you', he concludes, 'that justice of any sort in principle as in execution emanates from the State'.[9] Sartre's answer is in his opening statement: 'We are powerless; it is the guarantee of our independence . . . What is certain, in any case, is that our powerlessness makes it impossible for us to pass a sentence' (Duffet, 1970: 43).

No such disclaimer is available to the TRC. The TRC has to cut through a complex dilemma. It must reconcile its nature as institution of the State – with the added complication that we have here a State machine in the hands of victors – with its role as forum, tribunal with public confessional. It must reconcile the tension between discourse and institution. To explore this impossible tension I resort, as I explained, to Luhmann's threefold classification of the 'dimensions of meaning' (*Sinndimensionen*) and account for the tension, in turn, in factual, social and temporal terms.

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THE FACTUAL DIMENSION: ACCOUNTING ON LAW'S TERMS

LAW'S INCOMPREHENSION

The TRC encountered serious difficulties in its function as 'public confessional', repeatedly described as a 'failure' in the words of victims of apartheid, secondary literature on the TRC, in the words of the commissioners themselves. In the 'Findings and Conclusions' section of the report, the commissioners deplored the apathy that had surrounded this unique experiment. The United Democratic Front, the ANC's major internal ally, had been cynical and unforthcoming. The Inkatha Freedom Party, the Zulu nationalist party, had made no pretence of co-operating (except to deem it an 'ANC witch-hunt' and an elaborate attempt to 'vilify' Buthelezi). De Klerk had been vague and evasive. The NP leaders had assumed responsibility in general terms but there was very little disclosure of facts. Dubois identifies as one of the TRC's main weaknesses, its failure to 'uncover much that was truly new. The role of proxy forces, covert police and military activity . . . had already featured prominently in the press . . . Amnesty applications did shed light on some events, but some of the most notorious incidents still remain shrouded in mystery' (Dubois, forthcoming). The oddity in the matter is that the truth uncovered by the TRC 'depended on whether that truth had already been, or was likely to be, uncovered by the ordinary process'.[10] Submissions of perpetrators of human rights violations, said the commissioners, 'seemed to take the form of ritualised platitudes rather than genuine expressions of remorse'.[11] The appearance of the ANC before the TRC was an exception: it took responsibility for human rights violations of its members and dealt frankly with the commission's questions. It was, of course, the ANC that also tried to block the publication of the report.[12] As for the representatives of the former state, their submissions to the commission – with the exceptions of the much acclaimed whistle-blowing by the apartheid henchman Eugene de Cock and the police commissioner Johann van der Merwe's 'breakthrough' confessions – 'consisted of little more than recitations of the policies under which these groups operated and often unconvincing apologies for excesses committed' (TRC Report, vol. 5, ch. 6); or denial: 'You [the TRC] erred in your assumption, and the expectations you created in public, that the SADF was guilty of gross violation of human rights on a substantial scale'.[13] Intriguingly, denial also came from the Judges of apartheid.[14]

But the point I want to make is that it is the TRC's hybrid nature that accounts for its schizophrenia, the faultline running between institution and confessional providing the reasons why the TRC faltered on both grounds. Because as tribunal, as an institution of law, the TRC did not work either. Although at the time that it was tabled in the National Assembly the legislation establishing the commission, (*The Promotion of National Unity and Reconciliation Act 34*, of 1995, as amended by Act 87 of 1995, hereafter 'the Act') was held by the press to be most sensitive, technically complex and important, in truth there is repetition, circularity and overkill. For all its

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tortured definition of political crime, for instance (the Act, s. 20(2) and (3)) the application of the category remained alarmingly irrational. The following is an example.

Janus Walucz and Clive Derby-Lewis were serving prison sentences for gunning down Chris Hani, leader of the communist party and outspoken critic of apartheid. They applied for amnesty before the commission for their act which had been committed, they claimed, with a political objective. When it was suggested that their act fell short of the criterion of 'associated with a political objective', the applicants reminded the judges of the danger of 'total onslaught' and the need to prevent the communist threat, the official narrative that had informed State policy in South Africa, internal and foreign, for decades. When the committee declared that it could only recognise political objective in 'a supporter of a publicly known political organisation . . . acting on behalf of such an organisation . . . *bona fide* in furtherance of a political struggle waged by such organisation' (the Act, s. 20 (2)), the amnesty-seekers, in the last resort, explained that they were members of the Conservative Party and that the Party could not but condone their action ex post facto. It is impossible, I think, not to concede that the refusal of amnesty in this case is radically at odds with the perpetrators' understanding and lived experience of political motive.

In every aspect of its working, the TRC was steeped in law: it engaged in legal interpretations of key notions – 'just ends, just means' and 'crime against humanity'; 'victim'; 'severe ill-treatment'; 'political context, political motivation'; 'accountability'. It enjoyed significant procedural powers, among them, the power to issue subpoenas and force people before it, to compel witnesses' testimony; to decide on the admissibility of evidence; to authorise searches and seizures; to subpoena documents; to grant amnesties (the Act s. 29, 31, 33, 37).

At the same time, however, in so many ways, the TRC's function as an institution of law is bracketed. It is said to have had 'an august role, a specific function beyond the ordinary norms and procedures of crime and punishment. It must not become ensnared in the narrow business of determining guilt or innocence. We already have courts that can do that' (Asmal et al., 1996: 12). To perform this 'august role', the criterion of 'beyond reasonable doubt' was replaced by the test of a 'balance of probabilities' and many findings were accepted on untested premises. Both compromises were justified on the grounds of the commission's unique mandate: reconciliation, not retribution. But most significantly, and remarkably for the legal credentials of this quasi-judicial body, its procedure was in a crucial respect *reflexive*, self-stipulated. In the crucial section 30 of the Act, that prescribes the procedure to be followed at investigations and hearings, and in the litigation that ensued, note the law's internal struggle as it attempts to reconcile the powers it gives the TRC to fulfil its mandate with some minimum constraints of the Rule of Law:

> The Commission and any committee shall in any investigation or hearing follow the prescribed procedure or, if no procedure has been prescribed, the

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> procedure determined by the Commission, or committee or subcommittee as the case may be. (the Act, s. 34)

Section 30 was challenged by Brigadier du Preez and Major General van Rensburg (*Du Preez and another* v *TRC* (1997) (3) SA 204 (A)); and also, roughly at the same time, by another security officer, Gideon Nieuwoudt (*Nieuwoudt* v *Truth and Reconciliation Commission* (1997) (20) SA 70 (SE)). Actions and counter-actions ensued that nearly crippled the TRC. All three sought to restrain the commission from receiving or allowing any evidence during the hearings that might adversely affect them before they had been provided with 'such relevant facts and information as might be reasonably necessary' to enable them to exercise their rights. The court in the first instance ruled that the TRC did indeed have an obligation to furnish the applicants with sufficient facts and information to enable them to identify the events and incidents involved in the anticipated detrimental evidence. The TRC sought to reverse this decision on the grounds that adversarial procedures adopted in the legal system were wholly inappropriate to its inquiry. The court on appeal held that *in the context of its objectives and functions* . . . the TRC was *not* obliged to give prior notice to any person who might be implicated in a human rights violation. Judge Buchanan put it this way: 'That this may cause prejudice to a person who may be implicated is unfortunate . . . Such prejudice, however, should in my view, nevertheless be weighed against the laudable and important objects which the Act seeks to achieve' (*Nieuwoudt* at 75 A–E). But this was again reversed in a further appeal to the Appellate Division, where the judge relied on common-law principles requiring the observation of rules of natural justice; he held to the principle of *audi alteram partem*, whatever the body, quasi-judicial or administrative (*Du Preez and another* v *TRC* (1997) (3) SA 204 (A) at 233C–E). Thereafter, the commission adopted the procedure of sending notices to alleged perpetrators, accompanied by all relevant documentation. The cost was immense. Most significantly, in the context of this discussion, it compromised the TRC as forum in crucial respects: (i) the TRC came to be seen as too perpetrator-friendly; (ii) the hearings became too formal and thus hampered the already painful process of giving public testimony; and (iii) the TRC had to contend with perpetrators demanding to be heard at the same hearing as victims and requesting that they be allowed to cross-examine witnesses.

Let me pause, briefly, to look at how the judges, in *Nieuwoudt* above, in *Azapo* below, deal with what I called earlier the 'impossible' tension between tribunal and confessional, between law's reductive moment and the confessional's reflexive one. In deciding against the challenge to the constitutionality of the amnesty provision (and refusing the application for an interdict to restrain the commission from granting amnesty), Judge Mahomed puts it like this:

> Secrecy and authoritarianism have concealed the truth in little crevices of obscurity in our history. Records are not easily accessible; witnesses are often

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> unknown, dead, unavailable or unwilling. All that effectively remains is the truth of wounded memories of loved ones sharing instinctive suspicions, deep and traumatising to the survivors but otherwise incapable of translating themselves into objective and corroborative evidence which could survive the rigours of the law.
>
> The Act seeks to address this massive problem by encouraging these survivors and the dependants of the tortured and the wounded, the maimed and the dead to unburden their grief publicly; to receive the collective recognition of a new nation that they were wronged and, crucially, to help them discover what did in truth happen to their loved ones, where and under what circumstances it did happen, and who was responsible. (*Azapo and others* v *President of the Republic of South Africa and others* (1996) (4) SA 671 (CC))

This is a remarkable statement coming from a judge. He openly concedes the tension; what he urges of the TRC, he urges at the expense of law; for how could the accounting of suffering ever be 'translated' and be expected 'to survive the rigours of the law'? The departure from established constitutionality of State Law is *in the name of the impotence of the law*, of its *certain incomprehension*.

LAW'S MERCY

My second argument that relates to the 'factual' dimension of meaning has to do with the attempt to reconcile justice with mercy, or, less crudely, to reconcile law's demand for justice with mercy as a prerequisite for reconciliation.

Cases of transitional justice are intriguing because rarely in the past has the law so spectacularly moved away from its grounding in notions of formal justice and retribution towards the exercise of mercy. But equally rarely has the balance looked so tentative, the law's 'merciful', reconciliatory function so vulnerable. In the more extreme cases, as for those who challenged the constitutionality of the Act that established the TRC, the law was offering indemnities *without regard* to the requirements of justice. Justice sets rules and rule-like exceptions to these rules; within their ambit all so determined like cases must be treated alike. If mercy is to be something beyond that, an independent virtue, it must provide its own criteria for judgement that are other than those stipulated by those rules. But whether in the context of South Africa or not, and however broadly we understand mercy, its exercise remains an incongruence, an 'unnecessary' further step once justice has been done, an open exercise of discretion in the face of a settled question, a sort of inevitable anomaly in the administration of justice. Why? Because mercy forces judgement into a paradoxical situation. The paradox is well described by Jeffrie Murphy (1988). He argues that mercy seems to require a departure from justice and therefore to require injustice. For if the requirements of mercy coincided with the requirements of justice, mercy would not be an autonomous virtue. Mercy seems to be either reducible to justice or not to be a virtue, in requiring an extraordinary departure from justice. As a free act

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of compassion or love, adds Nigel Simmonds, it would appear to transcend the bounds of right and justice. Simmonds invites us to consider the situation of one who pleads for mercy: 'If one offers some general reason for being given lenient treatment, or one points to features of the case that support such a claim, an argument of justice has been offered and in asking for justice one does not ask for mercy' (Simmonds, 1993: 52, 59). François Dubois argues that what was unique in the TRC was the space within which it located itself, as challenging the traditional framework of justice, the self-evidence of its own installation within it: 'The creation of the TRC was not an attempt simply to create an alternative mechanism for corrective justice. It was much more ambitious than that: South Africa tried to create a just alternative to corrective justice itself' (Dubois, forthcoming).

My argument against the legal means of achieving this has to do with the irrationality at the heart of merciful legal judgement. I have argued this at length elsewhere (Christodoulidis, 1999) so I will only sketch the argument here, in so far as it explains the irreconcilability between law and reconciliation. In administering justice, the legal discourse cannot move beyond categorising through abstractions that are necessarily reductions in the scope of possible categorisations of persons and events. As such, the law stands impotent before the particular, in our case the person appealing for mercy. It has to address the complexity that confronts it by reducing that complexity and of course it can neither address nor redress its own complexity deficit that results from this. It is that deficit and the blindspot that accompanies it that forces law to miss the particular. At the same time, there can be no *legal* judgement over appropriateness of the application of law. There can be no decision *within* a context as to the appropriateness *of* the context. While I can only hint at both these arguments here, my point for present purposes is that only ethical reason can accommodate mercy; merciful judgement belongs to *its* realm. Ethical reason is *reflexive*, it *can* accommodate complexity, and allows for the comprehension of the 'other' not as classification in terms of abstract categorisation, but as inseparable from 'his' invocation. Ethical reason in this way lends a great plasticity to the encounter with the 'other' because while it fixes the terms of that encounter (it could not *not* fix them) it keeps open the question of their revisability *as appropriate to the encounter rather than as appropriate to a certain function*, as is the case with law. What emerges here is a disjunction between the reductive and the reflexive; the reductive works to immunise against risk, while the reflexive remains that only through openness to risk. Risk, at this abstract level, means nothing else but the embracing of contingency, the admission that a determination could be otherwise.[15] In law, the determination of a relationship or an event is driven by the exigency to minimise uncertainty over its terms. In contrast, the ethical moment embraces openness, since respect for the particular demands that the determination of the 'other' remains – in a sense – unfinished. Played out at that level, at the level of constitutive determinations of their objects, with law overdetermined by closure and reconciliation requiring an openness to the 'other', the TRC's

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mandate to be just *and* merciful stumbles on that disjunction between law and ethics.

There is a possible objection to all this that I would like to anticipate:[16] that in drawing out the disjunctions on which my argument depends – tribunal versus confessional, discourses legal against ethical, the reductive against the reflexive, justice against mercy – I am employing a specifically western concept of law that does injustice to those whose concept of law might accommodate the reflexivity, the solidarity: *ubuntu*,[17] and the confessional moment that I argue law always-already undercuts. I will insist on the disjunctions and attribute the detrimental effect to the institution of law *simpliciter*, at least in those respects that matter here: in respect of the finality of the legal decision, the decisionist imperative itself, the fixing of constituency through jurisdiction and law's orientation to the past – either as adherence to institutional sources or to tradition. I take these to be implicit in the legal phenomenon *whatever* our concessions to legal pluralism and hence I stand by my argument: that the law imposes reductions on understandings that stand in the way of genuine reconciliation, because they either overdetermine reconciliation or they introduce a priori that elide or fix the reflexivity that might have realised it.

THE SOCIAL DIMENSION: THE UNWARRANTED INVOCATION OF THE 'WE'

Let me begin this discussion of the social, of community and nationhood, with a short comparison of the uses of the indexical 'we' (emphasis added):

> The idea of the TRC goes back to ANC decisions . . . [T]here was a strong feeling that some mechanism needed to be found to deal with all violations in a way that would ensure that *we* put our country on a sound moral basis. And so a view developed that what SA needs is a mechanism which would open up the truth for public scrutiny. But to humanise our society we had to put across the idea of moral responsibility – that is why I suggested a combination of the amnesty process with the process of victims' stories. (Minister of Justice Dullah Omar in a radio interview, October 1993)

> The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the Reconstruction of Society.
>
> The adoption of this constitution lays the sure foundation for the People of SA to transcend the divisions and strife of the past . . .
>
> These can be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.
>
> . . .
>
> With this Constitution and these commitments *we*, the people of South Africa, open a new chapter in the history of our country. (From the Postamble of the S. A. Constitution of 1996)

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> The report fails to reflect the truth that the struggle *we* waged helped *ou*r country to avoid the death of millions of civilians and radically reduced the hostility of our people to those who belonged to the 'oppressor nation'. (From the ANC's submission to the TRC against its Findings, October 1998:)

> *We* have been robbed. (From the ANC Freedom Charter)

Is the 'we' of 'our' country the 'we' of the Constitution? Does the 'we' include the 'oppressor nation'? Does it include it *a posteriori*? Who has robbed 'Us'? Have 'we'? How frail this 'we'; how much mileage is left in the indexical?

THE COLLECTIVE MEMORY OF CONFLICT

Reconciliation invites a risk in the 'social' dimension; it has to do with the frailty, the reflexivity and the inevitable contingency of the 'we'.

Sociologists of conflict and consensus theorists have both, in different ways, pointed to the complex, constitutive link that exists between conflict and collective identity. For Simmel, 'conflict is a form of socialisation' because:

> it heightens the concentration of an existing unit, radically eliminating all elements which might blur the distinctness of its boundaries against the enemy; . . . The unifying power of the principle of conflict nowhere emerges more strongly than when it manages to carve a temporal or contentual [sic] area out of competitive or hostile relationships. (Simmel, 1955: 98)

What does this 'carving out of a temporal area' mean? I would suggest that conflict does this in two ways. It does it in the sense that time is thematised in conflict as part of the conflictual reality in that it can work for or against the opponent and can be operationalised in strategy, but also because it creates an anomaly in terms of the modalities of time: *in conflict everything is actual*. On the one hand, the memory of the past overwhelms the present: nowhere as much as in conflict does history become so unambiguous. On the other hand, conflict suspends time: in the anticipation of retaliation and revenge – those significant reductions through which conflict is experienced – the experience of time unfolds in an extended present; its suspense is a suspension of time.

But I will return to this subject. For now, let me identify the critical risk for reconciliation in this social dimension, in the context of conflict, in this way. Conflict 'as socialisation' can work in two ways: in bringing people together in their *overcoming* of the conflict that a community assumes to be internal (and here reconciliation and restorative justice is possible) or in *maintaining* it (in which case reconciliation never gets off the ground). It is a mistake to assume that either form of conflict is detrimental to community. No, both enhance community but set its constituency differently. And it is a mistake to elide that distinction, because the risk that there will be no restoration cannot be avoided because we decide to ignore the risk a priori.

Let us see in more detail why. The 'phenomenal' connection between conflict and collective social identity is that between the struggle and who 'we',

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as those engaged in the struggle, assume to be. In conflict are identities formed and consolidated, through conflict is entry into public space effected in a way that attracts commitment and allows solidarity in consolidating oppositions. In this context, Simmel says:

> Conflict may serve to remove dissociating elements in a relationship and re-establish unity. Insofar as conflict is the resolution of tension between antagonists it has stabilising functions and becomes an integrating component in the relationship. However not all conflicts are positively functional for the relationship, but only those which concern goals, values or interests that do not contradict basic assumptions upon which the relationship is founded. (1955: 80)

This difference allows him to draw a distinction between 'communal and non-communal conflicts':

> Non-communal conflict results when there is no community of ends between the parties to the conflict . . . Non-communal conflict is seen as disruptive and dissociating. Communal conflict, that is based on a common acceptance of basic ends, is, on the contrary, integrative. When men settle their differences on the basis of unity, communal conflict will ensue. (1955: 75)

Talk of reconciliation all too often elides the distinction that matters by disposing of the dangerous non-communal type of conflict and assuming that conflict is always-already of the communal type. Then, of course, by definition, engaging in conflict will bring people closer together because there isn't a fundamental enough cleavage in the first place that could have driven them further apart. Having presupposed that the conflict was of the communal type anyway, having therefore begged the question, the argument about the restoration of community can be made without reference to the risk that conflict may in fact drive communit*ies* further apart.

This conflation of conflicts is at the heart of the impossible task the commission sets itself. Its use of the language of law allows it to elide the distinction and ignore the risk; the risk, that is, that non-communal will not become communal conflict just because the TRC has provided a forum for accounting for it. But the problem goes deeper and undercuts law's claim to be a means of establishing community. The problem has infected an increasing range of current political and constitutional theorising. Take, for example, the 'republican' theory that is sweeping American scholarship,[18] and one of its most interesting advocates, Frank Michelman. Michelman allows the same slippage and explains a previous 'paradigm' of reconciliation – the integration of black Americans into American society – in similar terms. About the civil rights movement he argues that black Americans used their own 'partial citizenship' and effected a self-revision of 'our' communal standing; they drew from the common normative resource pool – a 'fund' – to pursue a politics that lead to a self-revised position. 'So the suggestion is that the pursuit of political freedom through law depends on 'our' constant reach for inclusion of the other, of the hitherto excluded – which in practice means bringing to

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legal-doctrinal presence the hitherto absent voices of emergently self-conscious social groups' (Michelman, 1988: 1529).

The endeavour depends on the existence of a common fund from which the parties to the conflict draw their understandings:

> Jurisgenerative political debate among a plurality of self-governing subjects involves the contested 're-collection' of a fund of public normative references conceived as narratives, analogies . . . Upon that fund those subjects draw for identity and by the same token, for moral and political freedom. That fund is the matrix of their identity 'as' a people or political community, that is, as individuals in effectively persuasive, dialogic relation with each other, and it is also the medium of their political freedom, that is, of their translation of past into future through the dialogic exercise of recollective 'imagination . . . The normative efficiency of the fund depends on a context that is everyone's – of the past that is constitutively present in and for every self as language, culture, worldview and political memory. (Michelman, 1988: 1513–14)

Surely we are to assume then that at the start there was no community, just a stark confrontation of narratives, of two positions that only generated community within and not between them. This is strikingly similar to the situation in South Africa today. In both cases the one was a narrative of oppression and of the promise of emancipation through struggle, while the other, in so far as it was not split into further, even more partial, patterns, was one of privilege and achievement, of a sense of ownership of the land, of guardianship, of heroic conquest in the narrative of the Boers who undertook 'the Trek' North to conquer territories that later came to be known as Natal, the Orange Free State and the Transvaal,[19] but at the same time this was a narrative of insecurity and fear. There is a problem here, and its solution depends on how seriously Michelman takes his own presuppositions. If, as he admits, communities draw from oppositional and mutually exclusive narratives, surely they have very little, if anything, in common to recollect from the fund.

So much for sharing the fund of narrative and normative commitments. But further, to the extent that the black movement was successful in each of the mentioned moments, does it follow that this led to integration into communal identity? Why ever would it? Why would superimposing the status of equal citizenship on a genuine diversity of identities, needs and expectations fulfil the quest for community? In fact could not the converse be argued: that the success of the movement, rather than creating a community, actually divided one in that a substantial minority of white segregationists found themselves pushed out of a community of new sensibilities? Theirs would be a story of the birth of a new narrative that explains past common history of the white community in a new way. Probably, this new narrative would explain away the unity of the original white community. How do these theorists suggest dispensing with this possibility? Dispensing with the danger identified by Adam Czarnota, that 'legal institutions will, by their very nature, support hegemonic collective memories to the suppression of others?' (Czarnota, forthcoming). Why should one assume that the end result of our accounting of the past will

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move us any closer to a shared community than to a breakdown of community? What makes the danger impossible and the risk invisible?

In the first case, memories collected from master and slave constitute, in (Michelman's and) the law's eyes, the normative 'fund', the inventory of communal experience, those proto-understandings that are shared in some a priori sense. They will be shared again, having undergone the transition from pre-interpretative to interpretative and in the process allowed a collective memory to crystallise around them. As Scott Veitch puts it, '[t]he importance of this is to foster a memory within which the idea of healing can be propounded as a progression and thus the problem of temporality dealt with on terms commensurate with its overcoming' (Veitch, 1999: 157). I will leave the question of time until later and for now agree with him on this: that however convenient a demarcation the new South African nation might be, the question of constituency cannot be elided in this way without either belying collected memories or overdetermining them; in either case the purported transition from collected to collective memory is unwarranted. And the history that the Constitution invokes is that of a collective memory that *could never have been* yet seemingly *must be*.

This links to a second legal a priori: that collected memories will survive their transition to collective memory in the first place. That there will be *consensus* over the explanation of the struggle is an unwarranted assumption, warranted merely by the fact that law is driven by a decisionist imperative and must 'resolve' disagreement over the 'truth of contested memories' and has devised a body of rules and criteria about what truly constitutes what, the terms of contestation, as well as *what* can be remembered, *what* forgotten.[20] Most importantly, this required a special orientation to selection, to its balancing of institutional memory and forgetting.

Of course, what 'is specific to history is that it enables optional access to the meaning of past [and thus also] of future events, and thus leaps within the sequence. History originates in the release from sequence' (Luhmann, 1995: 79–80). The argument about law's selectivity working against genuine reconciliation turns on the attempt to police the access and set the contours of institutional memory in a way that installs it as communal. In all this the institutional moment highjacks the discursive by inserting at the social's most crucial junction the a priori of the existence of community. The TRC, the forum of collected memories, becomes the institution that marshals collective memory; the assumption that *collected* can become *collective* usurps and overdetermines; it is an a priori assumption that when read into reconciliation cancels it out by doing violence to the understandings that might have established it.

THE POLITICS OF NAMING

The question of naming – I borrow the formulation from Scott Veitch here – is this: when does a freedom-fighter become a terrorist? And does 'terrorist'

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as self-description need to be endorsed before the process of reconciliation and healing can begin?[21] Does reconciliation demand a convergence here, a common narrative, one in which the freedom fighter ought to assume his proper description as terrorist who, remorseful, returns to the fold? This re-casting of the terms opens the problematic relationship of reconciliation to identity and then, in turn, to time.

What do freedoms fighters share with terrorists, how does the question of naming bear on the politics of reconciliation? The problem is acute because the definition of identity under which conflict is undertaken is an important stake of the conflict. Conflict dictates what significant features underpin the self-understanding of the 'we' and more generally, under what capacity or in the name of what cause the political actor enters conflict. The important correlate is what one attributes as identity to Alter. The two aspects of conflict that are in danger of being screened off are: (i) the freedom to choose the description under which one enters the conflict – in the name of what Ego wages the struggle; and (ii) the correlate freedom to deny the identity of Alter, which includes the freedom to choose how to identify Alter. I say 'in danger' because here, again, as earlier, the risk that reconciliation may not succeed is linked to the question of whether these correlate freedoms are denied.

We can link this back to the question of conflicts communal and not. The shaping of identity pre-supposes the existence of Alter-as-Enemy involved with Ego in a situation of conflict. In cases of 'communal' or 'in-group' conflict the positioning of Alter and Ego is transitory and instrumental to bringing them both to community. Here, basic understandings and assumptions will in the end be shared, qualified by having undergone the catharsis of conflict. This assumes an overriding common interest to secure the 'common good' that in turn allows conflicts to be depicted as always secondary or sectional, conflicts that are about the mode of bringing about the common good. Alter-as-enemy never remains for long the mirror for the assumption and maintenance of the identity of Ego.

The problem with this thesis is that projected onto the complexities of real processes of reconciliation it inserts a priori where important interpretative questions need to be addressed. That South Africans 'shared a political memory, world view [etc.]' (see Michelman, 1988 above) is simply wrong in the face of starkly oppositional narratives; surely the notion of a shared memory is not employed here to describe the experience of both master and slave of their 'common' history. If, on the other hand, this is the smaller point that Michelman's 'jurisgenerative fund' is an all-inclusive category that covers all potentialities, all proto-understandings that will later furnish normative positions in such stark confrontation as the ones we are dealing with here, then the point is so small as to become trivial. Because in 'sharing' the fund – the precondition of community – the communities in conflict share nothing in any recognisable sense of sharing, the 'common good' lacking any common-ness and so underdetermined that it is impossible to name. And with it, republicanism thins community to its surface manifestations.

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To summarise, first, we should resist the stipulation of conflict as always-already communal on the grounds that this stipulation removes the reflexive question on which the existence of community turns, and at which point it is risked. Secondly, we cannot screen off the politics of identity (the question of naming) without risking an effacement and thus an inclusion that is not. How do the communities understand *their* conflict? How do political actors understand themselves? If one is professing to contain the politics of a community it is a question for the community to answer whether or not a conflict allows the community to consolidate its collective identity *in overcoming it or in preserving it.* That is a genuine risk that reconciliation must address and it does not solve it by pretending it isn't there. We cannot build reconciliation on a blindspot.

When Archbishop Tutu talks of the aim of the TRC as being 'the promotion of national unity and reconciliation' . . . 'the healing of a traumatised, divided, wounded, polarised people', he is introducing a number of a priori assumptions. He is assuming an 'in-group' conflict that has polarised a community (mapped onto a nation) and can be healed – transcended. 'Look at the assumptions he makes', writes Michael Ignatieff: 'that the nation has one psyche, not many; that the truth is one, not many; that the truth is certain, not contestable; . . . These are not so much assumptions of epistemology as articles of faith about human nature' (Ignatieff, 1996: 111). I will ignore 'assumptions of epistemology' because I do not understand what that means here; but 'articles of faith' they certainly are. Yet that is not the problem; reconciliation needs articles of faith. What I am arguing is that these need to be kept in view for being just that; that there is nothing ineluctable about reconciliation leading us there; and that the risk for reconciliation is that it must remain attentive to that contingency (and revisability) of the 'we' and that it cannot police the risk by arbitrating memories and identities and fixing constituencies for communities. My argument is, thus, that reconciliation must assume these risks while aspiring to that faith.

THE TEMPORAL DIMENSION: THE TIME OF RECONCILIATION

I want to find a useful way to make sense of the time of law and that of reconciliation such that would allow me to say something about their contrasting modalities that doesn't collapse the argument into what has already been analysed in terms of the factual and the social. What can be said about the temporal dimension needs to be disengaged from the question of who/where/what and how; the temporal axis of meaning must be something over and above time's registering into – its collapsing into – any of the above.

What is the problem of setting up the inquiry into time in a theoretically productive way? The problem is that more often than not the question of time is not addressed on terms that are properly its own. The analytical philosophical approach tends sooner or later to define time in terms of change, as succession of events. 'Temporal relationism' centres on the relationship

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between time and change, and as such reduces the temporal instance to some other category. 'Causal theories of time' – at least an influential position within them – defines temporal relations in terms of causal relations. The asymmetry of causation, temporal becoming, points to the directional element of time. Definitions in terms of 'flow', 'passage' and 'irreversibility' either follow from or are connected with this. The Aristotelian question whether there can be 'empty time', time not registered in experience becomes particularly apposite.[22] And then, of course, we have the question of the 'unreality of time', as famously expounded by McTaggart (1908). He argues that nothing 'that exists' can be temporal; and that time is thus unreal because all statements that involve its reality ('tensed facts') are erroneous.[23] And while this is fascinating, is it really pushing against the limits of our understanding of time or merely abandoning the question, ironically in the very name of analytical rigour?

These approaches are unhelpful because by not treating time on its own terms they do not get the theoretical exploration off the ground at all. Simply put, a theory that explains time in terms of change, i.e. as succession of events (or states), is unproductive for the following reason: since events require time in order to be individuated as such it seems *at least paradoxical* to employ events to parcel out time – in order to understand it as succession. The mutual constitution is here completely self-undermining. Similarly, the event – that which counts as the indissoluble, elementary unity of happening – has a conferred, not an ontological character. Time is an aspect of what a system of meaning conditions as event. 'Eventhood' is reconfigured and forever renegotiated among systems on the basis of both different modalities and differential acceleration/condensation of time. It is nothing novel to say that during revolutions, or other limit situations, time accelerates compared to periods of stability; that suspense involves deceleration, even the suspension of the flow of time. At the same time, acceleration and deceleration themselves are meaningless unless they register against a different time perception, a difference between enduring and changing. In all, no concept of time that goes beyond the mere fact of changing (and thus is theoretically unhelpful because it says nothing specific about time) can be determined without a system reference.

I suggest doing precisely that. I will define time self-referentially, as a difference between past and future, or less crudely, as being constituted by its orientation to the double horizon of past and future (Luhmann, 1995: 74–82 and ch. 2 passim), and argue that anything else that can be said about time meaningfully must tie time to a system reference. Seen in this way, there is no congruence between the time of law and the time of reconciliation. There is a fundamental incompatibility here and where this coincidence is assumed, two aspects of irreconcilability are elided. The first has to do with two *different modalities* of time. The second has to do with *law's temporal inertia* in its handling of *risk*.

Beginning with this second point, it is a much theorised premise of systems theory that information registers in the system only when its

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memory is activated, an expectation met (Luhmann, 1995: 278–356). A system's structures are its structures of expectations: these actualise information from the environment as memory and anticipation. The system can handle surprises and it can handle the risk these surprises carry only when these can register as disappointments to expectations, to projected states. Obviously much that happens never registers at all, and when it registers it only does so on the system's own 'temporal' terms. It may not register because, as the system is an island of reduced complexity in a much richer world of possibility, in temporal terms there can be no full synchronisation with the environment.[24] Thus, not only does not everything register but when it does it does so within the scope of the system's own balancing of what Luhmann calls 'variety and redundancy' (Luhmann, 1995: 172–4) variation and inertia, a system's natural reluctance to vary its structures. So much more so in the legal system whose overwhelming orientation is towards 'redundancy', inertia, a reluctance to vary its expectations – a redundancy that directly supports its function in society of securing and stabilising expectations. In that sense law is a special case; its overwhelming redundancy, its strict pre-selection of possibilities of surprise is tied intimately with the rule of law; its non-correspondence not merely a standard case of 'selection achievement' but also one particularly tailored to its own unique function.

But if law is about stilling, reconciliation, as an ethical imperative, *cannot* build on what is thus stilled. It must endorse risk. Its natural temporal state is unrest, it propels itself forward by resisting what in the past was insufficient for its purposes. Of course every experience of meaning, in ethics or in law, will have built into it an element of unrest. But just as law was a 'special' case of inertia, reconciliation is a 'special' case in the opposite direction. Reconciliation is 'not yet'; and *this 'not-yet' is a risk brought into the present to become constitutive of the experience of the present.* As such, it is to be celebrated. Because this 'not-yet', this tending into the future imports an awareness that keeps community both attuned to the aspiration of being-in-common and aware of its vulnerability; it thus taps the source of its being, to the extent that community must be conceived as dynamic, as always in the process of becoming. As Luhmann might argue, community in these contexts *is* what *it is not yet*; its present state is its present-future. Nothing more needs to be said about the 'not-yet'. The aspiration for reconciliation is an extreme (test-) case of every community's drawing of its identity from its future enhancement. The key, thus, lies in the present-future not in the present-past.

With this, we are in the realm of temporal modalities and the first of the aspects of irreconcilability mentioned above. Law's [present] time looks to the past to anticipate and condition future states. In the standard way of understanding law, law draws from the past to determine the future. To control the future – and the future affects the present above all as risk – the law will draw on the past as resource. It will re-visit its sources, it will re-instate normative expectations. On the contrary, reconciliation looks to the future, inclines towards it, its present is overdetermined by the projection of its realisation in

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the future. The clash of modalities is expressed in the paradox of this simultaneous inclining to past and future; the combining of law's need to control the future and secure its stable reproduction to reconciliation's need to accelerate, to adapt to the demands of the future and to risk. Paradoxes emerge everywhere: what does this overwhelming orientation to future stakes – or better the stake of a common future – leave behind *as* past? Is it law's past, the entrenchment of the common law, its anchorage in past practice? Certainly not, for this as fraught with injustice is a past that must be denied in the name of the future and yet the future can only be that by establishing a point of origin in what *has* been. The rather obscure notion of 'a healing truth' that the TRC refers to often as 'the kind of truth central to the commission's task' captures this problematic. Dubois explains it thus: 'the forward-looking therapeutic concept of truth employed by the TRC, depended crucially on a prior judgement about what had gone wrong in the past and required "healing" in the interest of the future.' (Dubois, forthcoming). A healing truth must be diagnostic and yet cannot be. As Veitch puts it in a somewhat different context, this is a past that 'cannot be remembered except as forgotten' (Veitch, 1999: 156). No constructive tension here between law and reconciliation; instead, like before, like in the realm of the factual and the social, we have here a mutual undermining that yields a temporal impossibility.

CONCLUSION

In analysing and drawing connections between factual, social and temporal variables of the meaning of law and the meaning of reconciliation, I have not argued against the possibility of reconciliation but only about the limits of the legal means to realise it. Against this I suggested a theorising of reconciliation that undertakes it as a risk, one that involves a certain leap of faith. The risk – and the faith – is in this: that treating a non-communal conflict as communal will succeed in turning it into that, by incorporating it in a narrative that from a future point in a henceforth common future can be rationalised back as having led to that future. This is a rather elaborate way of describing something that involves a decisive move in terms of our understanding of time: the recasting of the present as *a point of origin*.

There is no doubt that there is risk in this. In Northern Ireland it took a leap of faith to put the 'troubles' and the deaths behind and agree to a partitionist assembly as a first step to a common future. The riskiness of this move became obvious with the emergence of republican splinter-groups, the terror of the Omagh bombing, the killing of Rosemary Nelson, the current state of 'imperfect peace'. It takes courage to persevere at this stage, to remain inclusive, to risk continuing along a road that at some point in the future will establish a posteriori the Good Friday agreement as the point of origin.

For strikingly similar reasons, reconciliation cannot draw on a denial of identity, on demanding on the victor's terms of 'freedom fighters' to account for themselves as 'terrorists'. Those who have been called by the system to

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exchange freedom for repentance, have not been offered reconciliation. The case arose with Northern Ireland's political prisoners in the dilemma whether to require individuals' statements (disassociating themselves from organisations) as conditions for release. It was decided not, for reasons that they would be strategically harmful and of uncertain legal effect. But the significant point is other: it is that they would cut away at reconciliation. For as Renato Curcio of the Red Brigades said, on behalf of Brigitte Monhaupt of the RAF and all those who refused similar deals, 'how am I expected to make a statement that will make a nonsense of my life?'

How wrong we are, says Donald Shriver in *An Ethic for Enemies* (1995), to think that there is nothing we can do to change our past. The problem for us in this context is of course that without recognition the past cannot take its proper place as past and thus cannot give us a place from which now to observe the future. Without recognition, as Ignatieff rightly observes, the past cannot be laid to rest, it remains haunting the present. We saw this when we spoke earlier of how conflict carves out its own time, rendering histories unambiguous and inviting them to haunt the present. 'When Joyce', Ignatieff writes appositely, 'had Stephen Daedalus say, in the opening pages of *Ulysses*, that the past was a nightmare from which the Irish people were struggling to awake, this is what he meant: as in nightmare, time past and time present were indistinguishable' (Ignatieff, 1996: 121). The past needs to be relocated as such before any process of accounting for it, and through that any process of healing, can begin. The past must be dislodged from the present. The problem with the legal re-writing of that past is that the law's 'always-already' imports the hypothesis that this *has* happened and on the basis of this projection, forges accounting and healing. But reconciliation cannot survive this reduction. Law forces denial and it re-traumatises – two of the main reasons truth commissions fail. There is no point denying that both happened in South Africa. Instead, it is by rescuing opportunity from law's 'always-already' that we risk (because a hypothesis is always a risk) reconciliation by disarticulating the 'temporal' deadlock that law inflicts on it.

In view of the nature of this hypothesis, in view of parties' differing, contrasting and mutually undercutting constructions of conflict, stake and identity, 'restoring a fractured body politic' is both unlikely and necessary. It involves a painful reformation of perception if it is to respect the integrity of those who have a different version of how we got to where we are.

The TRC as hybrid, as forum and tribunal, I have argued, throws reconciliation and the restoration of South African society in a paradox, at once 'not-yet' and yet 'always-already'. But unless we resist the interlocking of the two, what are we to make of this paradoxical opportunity? Caught between this 'not yet' and the 'always-already' this is an opportunity that defies locution. We looked into factual, social and temporal aspects of the processes of reconciliation and saw that where a reflexivity was called for, a reduction was imposed; where a risk needed to be taken, a legal a priori removed it. A mutual undercutting rather than constitution underlies the quasi-legal processes of restoration, reconciliation and nation building. Of course the law

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was employed experimentally in all this, to perform functions that tested its plasticity. But in each case it fell short of the task, reductions cutting away at its imagination (Christodoulidis, 1996). Just as in the case of mercy the law could not quite establish how it might rationally do it, its re-casting the past in view of a re-orientation to a future community was unconvincing. The Australian High Court's retrospective abolition of the doctrine of *terra nullius* in *Mabo* (*Mabo* v *The State of Queensland* (No. 2) (1992) 175 CLR 1) did not change the understanding of its racist past or restore community where there was none. Decommunisation in Eastern Europe does not ipso facto restore community. The TRC did *not* establish that there had always been a common 'we', a South African nation emerging through a divided past toward a common future; law cannot re-write history in that way, it cannot re-write collected memories as collective memory. Law cannot merge them into a narrative that a posteriori will do the job of ironing out the stark confrontations of narratives, the lived experience of master and slave. Of course the law *may* excuse Jeffrey Benzien and allow him to claim that he acted out of love for country. It may allow him to argue that *with hindsight* he too has been a patriot. It may even allow him to argue that with hindsight he is proud to have always been a member of this society. But, then, hindsight is a lie.

NOTES

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1. It was pointed out to me by Peter Fitzpatrick that Maurice Blanchot in fact reverses Scarry on this. In an extract I find both disturbing and troubling Blanchot writes:

   > Torture is the recourse to violence with a view to making speak. This violence, perfected or camouflaged by technique, wants one to speak, wants speech. Which speech? Not the speech of violence – unspeaking, false through and through. . . – but a true speech, free and pure of all violence. This contradiction offends us but also unsettles us. (Blanchot, 1993: 42–3)

2. The allusion here is to Habermas's writings on universal pragmatics and the notion of obligations that are 'speech-act-immanent'. Indicatively, see Habermas (1979) and White (1988).
3. For the internal connection (indeed interchangeability) between communication and community see J.-L. Nancy (1991).
4. The allusion is to Cover's all-too-easy contra-distinction between violence and the word, a violence that while in effect remaining external to the legal word, Cover also finds necessarily connected to it (Cover, 1986). On this, I have greatly benefited from reading Peter Fitzpatrick's 'Why the Law is also Non-violent' (unpublished MS).

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5. See Lyotard's fascinating theory of the différend (1988); in this context, see also, Christodoulidis and Veitch (1997).

6. > 'We must clarify the decomposition of the abstractum 'meaning'. This can be done with the help of the concept 'meaning dimensions' . . . we view factual references as merely one of several meaning dimensions. These factual references are not set against the subject but if meaning is complex enough, they must adapt themselves to complicated interdependencies with temporal and social meaning references. (Luhmann 1995*:* 74)

7. At a Conference on 'Burying the Past', St Anthony's College, Oxford, September 1998.
8. The allusion is to Dubois (forthcoming).
9. Letter from De Gaulle to Sartre, 19 April 1967, cited in Duffet (1970: 14).
10. Dubois (forthcoming) See also Hayner (1994: 607): 'the victimized populations are often clear about what abuses took place and who has carried them out'.
11. All extracts here from the *Truth and Reconciliation Commission Report*, volume 5, chapter 6: 'Findings and Conclusions', available on the TRC's website, URL: *www.truth.org.za*
12. In its submission, in October 1998, it states: 'The Commission's findings in effect delegitimize the struggle against Apartheid and . . . wittingly or unwittingly accords legitimacy to real gross human rights violations committed under apartheid', and 'has shown scant regard for the truth it was supposed to establish'.
13. General Viljoen, on behalf of the SADF at the TRC armed forces hearing.
14. On the role of the judiciary and bar both during the years of apartheid but crucially during the hearings, see Dyzenhaus (1998).
15. This concept of risk, as well as my reference to law's immunising effect, obviously alludes to Luhmann. In my opinion, the most complete – if abstract – statement of his position, in both cases, remains his extraordinary book *Social Systems* (1995).
16. I would like to thank Derek van der Merwe for pointing this out to me.
17. A key word that features in the Constitution and that, I am told, resists all attempts to translate it; an approximate translation would be 'brotherhood'.
18. For some of the main works of the republican turn in (American) constitutional theory, see also Ackerman (1991) and Sunstein (1988). For a fuller rebuttal of the republican argument see my *Law and Reflexive Politics* (Christodoulidis, 1998).
19. van der Merwe (1989: 671 ff.) on the nature of the Boer title on these territories and the incidence of their *imperium* over the defeated tribes.
20. Czarnota (forthcoming): 'Legal procedures and legal institutions have systematised remembering and forgetting. They have developed an impressive body of rules to prove the 'truth' of contested memories. . . Legal institutions . . . are [mechanisms] of systematic forgetting: files are closed conflicts are solved, offenders are rehabilitated, victims are compensated.' See also Czarnota and Hofmanski (1996).
21. This comes particularly into relief in the ANC's attempt to block the publication of the Commission's Final Report on the basis that it treats freedom fighters as simple criminals by disregarding the context of the 'struggle'. The same symbolic conflict is played out in all State treatment of terrorist action. See Christodoulidis and Veitch (1997).
22. There is a vast wealth of literature here; for a concise reader on analytic philosophies of time see Le Poidevin and MacBeath (1993).
23. He concludes: 'Nothing is really present, past or future. Nothing is really earlier

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or later than anything else or temporally simultaneous with it. Nothing really changes. And nothing is really in time' (McTaggart, 1908: 474).

24. This would make no sense for the system, it would undermine its reduction achievement, in fact it would undermine its control of its own time – its own selective actualisation of the environment (what aspect of the latter it will react to) – *as* a means to manage complexity.

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